No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Summary of Argument	8
Argument	12
I. Having probable cause to believe that petitioner had just committed a felony in his apartment, the police officers were fully authorized to arrest him immediately in the apartment without a warrant	13
II. Since the officers had authority to make an immediate arrest of petitioner in his apartment, they had authority to use the limited force here employed to make an entry for this purpose where necessary to overcome petitioner's physical resistance	19
A. Where there is probable cause for arrest without a warrant in a home, the officers are justified in using the force necessary to effectuate the entry	19
B. The officers made known their authority and purpose before forcing entry into petitioner's apartment	22
III. Since the arrest was valid, the search incident to arrest was lawful	27
Conclusion	29

CITATIONS

Cases:

Accarino v. *United States*, 179 F. 2d 456	10, 11, 21, 26
Agnello v. *United States*, 269 U. S. 20	9, 19, 20, 27
Argetakis v. *State*, 24 Ariz. 599	19
Appell v. *United States*, 29 F. 2d 279	19
Barnard v. *Bartlett*, 64 Mass. (10 Cush.) 501	19

448697—57——1

Cases—Continued

	Page
Brinegar v. *United States*, 338 U. S. 160	8, 13
Carroll v. *United States*, 267 U. S. 132	13, 25, 27
Collins v. *State*, 184 Tenn. 356	27
Commonwealth v. *Irwin*, 83 Mass. (Allen) 587	19
Commonwealth v. *Phelps*, 209 Mass. 396	10, 19
Commonwealth v. *Reynolds*, 120 Mass. 190	19
Gatewood v. *United States*, 209 F. 2d 789	21
Gibson v. *United States*, 149 F. 2d 381, certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U. S. 724	21
Harris v. *United States*, 331 U. S. 145	11–12, 27
Hawkins v. *Commonwealth*, 53 Ky. 395	19
Hiller v. *State*, 190 Wisc. 369	27
Johnson v. *United States*, 333 U. S. 10	8, 17
Kelsey v. *Wright*, 1 Root 83	19
Kurtz v. *Moffitt*, 115 U. S. 487	13
Maghan v. *Jerome*, 88 F. 2d 1001	13
Martin v. *United States*, 183 F. 2d 436, certiorari denied, 340 U. S. 904	19, 20
Mattus v. *United States*, 11 F. 2d 503	19, 20
McDonald v. *United States*, 335 U. S. 451	8, 17, 25
McKnight v. *United States*, 183 F. 2d 977	10, 21
McLennon v. *Richardson*, 81 Mass. 74	20
Mullaney v. *United States*, 82 F. 2d 638	19
Newyahr v. *United States*, 177 F. 2d 658, certiorari denied, 338 U. S. 936	13
Nueslein v. *District of Columbia*, 115 F. 2d 690	22
People v. *King*, 140 Cal. App. 2d 1	11, 27
People v. *Maddox*, 46 Cal. 2d 301, certiorari denied, 352 U. S. 858	27
Rent v. *United States*, 209 F. 2d 893	25
Shanley v. *Wells*, 71 Ill. 78	20
Shettel v. *United States*, 113 F. 2d 34	13
Smith v. *Tate*, 143 Tenn. 268	20
State v. *Mooring*, 115 N. C. 709	19
State v. *Shaw*, 1 Root 134	19
State v. *Shook*, 224 N. C. 728	19
State v. *Smith*, 1 N. H. 346	19
Thigpen v. *State*, 51 Okla. Cr. 28	27
Trupiano v. *United States*, 334 U. S. 699	12, 16, 28–29
United States v. *Chin On*, 207 Fed. 2d 531	19
United States v. *Dean*, 50 F. 2d 905	19
United States v. *Faw*, Fed. Cas. No. 15,079	19

Cases—Continued Page
United States v. *Freeman*, 144 F. Supp. 669 27
United States v. *Jackson*, 149 F. Supp. 937 13
United States v. *Rabinowitz*, 339 U. S. 56 ..... 12, 27, 28
Weeks v. *United States*, 232 U. S. 383 27
Woods v. *United States*, 240 F. 2d 37 27
Wrightson v. *United States*, 222 F. 2d 556 ..... 8, 13
Statutes:
Espionage Act of 1917, 40 Stat. 229 23
18 U. S. C. 3109 ..... 2, 10, 23
26 U. S. C. 7607 13
D. C. Code 4–140, 4–141 ..... 8, 13
N. Y. Code Cr. Proc. § 178 23
Miscellaneous:
5 A. L. R. 263 19
Conf. Rep. No. 69, 65th Cong., 1st Sess., p. 20, 55 Cong. Rec. 3305, 3307 23
1 Wharton, *Criminal Procedure* (10th ed.) § 51 20
Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 .. 10, 20

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 126

WILLIAM MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Appeals, *sub nom Shepherd* v. *United States*, are reported at 244 F. 2d 750, 759.

JURISDICTION

The judgment of the Court of Appeals was rendered on October 18, 1956 (R. 254), and a petition for rehearing was denied on December 3, 1956 (R. 255). The petition for a writ of certiorari was filed on January 2, 1957, and granted on May 13, 1957 (353 U. S. 957). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the officers had probable cause to arrest petitioner without a warrant.

2. Whether the officers, who had no other reasonable opportunity to arrest petitioner except in his apartment, were entitled to force their way into the apartment when, after having knocked and identified themselves as police officers, petitioner partially opened the door and then tried to close it when he saw who they were.

3. Whether there was a valid search incident to the arrest.

STATUTES INVOLVED

18 U. S. C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Following a jury trial held in the United States District Court for the District of Columbia, petitioner, and co-defendants Bessie Byrd and her 17-year-old brother, Arthur Shepherd, over whom the juvenile court had waived jurisdiction (R. 183, 246), were found guilty under an indictment charging them with federal narcotic violations (R. 35–37). Petitioner was sentenced to consecutive terms of imprisonment of 1 to 4 years on count 1 and 30 months to 8 years on each of counts 2 and 3. He was also fined $500 on each

of counts 2 and 3; execution of the fines was suspended (R. 232–234). The Court of Appeals affirmed, one judge dissenting (R. 238–253).

Prior to trial, petitioner moved unsuccessfully to suppress certain marked currency allegedly obtained by an unlawful search and seizure (R. 2–3, 34–35). The evidence adduced at the hearing on the motion to suppress, and at the trial, may be summarized as follows:

At 1:35 a. m. on the morning of March 25, 1955, federal narcotics agent Wilson, pursuant to a warrant, arrested one Clifford Reed on a narcotics charge (R. 8–9, 80). Reed, who had given agent Wilson reliable information in the past, told him that he purchased narcotics from petitioner's co-defendant Shepherd whom he would contact at the home of petitioner's mother; that his usual arrangement was to make the contact at around 3:00 a. m. in the morning; that he would give Shepherd $100 and Shepherd, in turn, would obtain 100 capsules of heroin for him from petitioner and co-defendant Byrd; and that on several occasions he had accompanied Shepherd to petitioner's apartment and waited outside while Shepherd went in and obtained the heroin (R. 9–12). Petitioner was known to Wilson because of his previous activities in the narcotics traffic and his conviction in 1953 for violation of the Harrison Narcotic Act (R. 10, 94–95). Reed further advised the agent that he was scheduled to make contact with Shepherd on that particular morning (R. 11).

At about 2:00 a. m., soon after Reed's arrest, Wilson met with several narcotics officers including police

officer Wurms, and trainee agent Lewis, and turned over $100 in marked currency to Lewis to be used to purchase narcotics from petitioner through Shepherd and Reed (R. 11–12, 53–55, 81–84). According to plan, Lewis gave Reed $50 of the marked currency to use as a "flash roll," and instructed him to inform Shepherd that Reed's partner was in the cab and would put up an additional $50 for the purchase of 100 capsules of heroin (R. 56, 67). When Reed returned to the taxi with Shepherd, he returned the $50 to Lewis, which Lewis then handed over to Shepherd with the rest of the marked funds (R. 57). Shepherd requested that they accompany him to petitioner's house, referring to petitioner by his nickname "Blue" (R. 58, 95). Lewis refused and, instead, the three men proceeded to Reed's home where Reed and Lewis left the taxi. Shepherd told them he was going on to the 1300 block of Columbia Road, and to wait for him until he returned with the "stuff" (R. 58–59). As Shepherd rode away, Lewis and Reed entered Reed's home. This was a prearranged signal to the officers, who had been following close behind, to indicate that Lewis had delivered the marked money to Shepherd (R. 13, 59, 84–85). Thereupon, the officers followed Shepherd as he proceeded alone to petitioner's apartment (R. 13, 87–88, 166–167).

After Shepherd entered the basement hallway leading to petitioner's apartment, agent Wilson looked into the entrance and saw no one in the hallway.[1]

[1] There were only three doors off the basement hallway, one leading to the outside, one to petitioner's apartment, and one to the furnace room (R. 98, 110–111).

Shortly thereafter, while on the street outside, Wilson saw a light go on in the furnace room, remain on a short time, and then go off (R. 13–14, 88–90). A few minutes later, Shepherd returned to his taxi, and asked the driver to take him back to Vermont Avenue (R. 14, 89–90, 168). The surveilling officers stopped the taxi soon after it left Columbia Road (R. 14–15, 91–92, 153–154, 168–169). As the cab driver opened the door, the dome light flashed on and Shepherd leaned forward and dropped something under the front seat in which he was sitting (R. 14–15, 92, 138, 154). The officers arrested Shepherd and searched the front seat (R. 14–15, 92, 154–155). Under it, they found a brown manila package containing 100 capsules which were immediately field-tested and found to contain opium (R. 14–15, 92–93, 147–148, 173). This package did not have any of the required federal tax stamps affixed thereto (R. 108, 151). A search of Shepherd failed to turn up the marked currency that agent Lewis had given him to purchase narcotics (R. 16, 94). Although admitting that he came from 1337 Columbia Road,[2] Shepherd at first denied that the manila package belonged to him (R. 15, 94). A few minutes later, he changed his story, claiming he had picked up the package from behind a fire extinguisher at the Columbia Road address (R. 15–16, 94).

Thereafter, at about 3:45 a. m., the officers returned to the Columbia Road apartment which they knew

[2] Agent Wilson testified at the trial that Shepherd had told him he had come from "Blue's place," on Columbia Road (R. 94).

petitioner occupied (R. 16, 95, 141).[3] At the pre-trial hearing, officer Wurms testified that when he knocked on petitioner's door, a voice from the apartment inquired who was there. He replied in a low voice "Blue [petitioner's nickname]. Police," and repeated it when someone inside again asked "who"? (R. 27).[4] Both officer Wurms and agent Wilson testified that petitioner, whom they recognized as having been connected with a previous narcotics case (R. 16–17, 27), thereupon opened the door slightly. Then, according to officer Wurms (R. 27):

> He took one look at me and tried to slam the door, at which time I grabbed the door and opened it.

In the scuffle, the door-chain was broken (R. 17); see also testimony of officer Wurms at the trial (R. 157–158).[5] Immediately after entering the apartment, the officers arrested petitioner and co-defendant Byrd (R. 16–17, 19–20, 27, 99–100). In Byrd's pos-

---

[3] All the officers, except officer Wurms, reached the apartment by going through the unlocked basement entrance and the basement hall. Officer Wurms went to the first floor, unlocked with a skeleton key the door to the stairway which led to the furnace room, and entered the basement hall through the furnace room. (R. 29, 157).

[4] At the trial, officer Wurms' explanation of why he spoke softly was interrupted by defense counsel after Wurms had said, "At a late hour, in the early morning, I——" (R. 157).

[5] The version of events, as recalled by agent Wilson at the trial, was that after petitioner opened the door part way:

"He said, 'What do you-all want?' And we says, 'Police, you are under arrest, we want in.' He says he was not going to let us in, or something like that, and so Officer Wurms took ahold of the door and pulled it open." (R. 99.)

session the officers found $100 in currency, $34 of which was part of the marked currency which had earlier been given to Lewis (R. 17–18, 27–28, 100–101). In the subsequent search of the apartment, the remaining $66 was located in a bed and in a hatbox (R. 17–18, 101, 150–151). In addition, one thousand empty gelatin capsules, of the same shape and size as those taken from the taxi in which Shepherd had been riding, were found in a dresser drawer (R. 114–115).[6] The search was completed at about 5:30 a. m. (R. 101–103). Just prior to leaving for the police station with petitioner and his co-defendants, Shepherd said to petitioner: "Blue, it wasn't me that turned you around" (R. 152, 158–159).

In denying the pre-trial motion to suppress, the district judge said that "there is no obligation to secure a warrant. I don't know how you are going to secure a warrant at two o'clock in the morning, anyway, because by the time you hunt up a magistrate and get an affidavit and come back with the warrant, the bird might have flown away * * * on a felony charge an arrest may be made without a warrant, provided reasonable cause is shown. This has been the law for centuries" (R. 31–32). He held that there was "ample proof of probable cause to make an arrest, and therefore the arrest was legal. The arrest being legal, the

---

[6] In the furnace room, the officers also found 381 capsules of heroin (R. 111), but the trial judge dismissed the counts (6 and 7) involving violations with respect to this heroin on the ground that the evidence was insufficient to show that any of the defendants occupied or had control of the furnace room (R. 198–199).

search was legal because it was incidental to the arrest" (R. 34–35).

SUMMARY OF ARGUMENT

I

The rule in the District of Columbia is that, where officers have probable cause to believe that a felony is being or has been committed, they are authorized to arrest without a warrant. D. C. Code 4–140, 141; *Wrightson* v. *United States*, 222 F. 2d 556, 558 (C. A. D. C.). Applying to this case the standard of probable cause announced in *Brinegar* v. *United States*, 338 U. S. 160, 175–176, the officers clearly had "reasonably trustworthy information" to believe that petitioner had just committed a felony in his apartment and therefore they had reason to arrest him in his apartment. The circumstances precluded any opportunity to secure a warrant of arrest. The arrest occurred at about 4:00 A. M. Plainly, the officers could not have expected to wait until business hours to make the arrest for there was a real danger that petitioner would learn of Shepherd's arrest, especially since Shepherd was Bessie Byrd's younger brother, who could usually be located at petitioner's mother's home. Thus, long before a warrant could have been obtained, petitioner could have fled and hidden or destroyed the fruits of the crime.

This case is entirely unlike *Johnson* v. *United States*, 333 U. S. 10, and *McDonald* v. *United States*, 335 U. S. 451, where the officers had no probable cause to arrest before they made the unlawful entry and no circumstances compelled immediate action. Here,

the officers had probable cause to believe that an offense had been committed in petitioner's apartment and that petitioner had participated in it. Moreover, the circumstances required that the officers act upon the information almost immediately after it had become known to them.

Speculation as to the underlying motivations of the arresting officers is beside the point. We submit that the officers acted lawfully even if it be assumed that, in deciding to place petitioner in custody immediately, they were motivated not only by the fear that petitioner might seek to escape but also by the belief that delay would have enabled petitioner to dispose of the narcotics and the marked funds. The fact that arresting officers wish, on valid grounds, to seize the fruits of crime as well as to make an arrest, under circumstances dictating immediate action, does not convert the arrest into a search, where the arrest is made at the place in which the offense was committed by the person arrested.

II

Having probable cause to effect the arrest without a warrant in petitioner's apartment, the officers were authorized to use such reasonable force as was necessary to obtain entry.

A. It is settled that, where necessary to execute a warrant of arrest, law enforcement officers may force an entry into an apartment. In circumstances such as these, the same authority exists where the arresting officer is acting on the basis of probable cause. See, *e. g.*, *Agnello* v. *United States*, 269 U. S. 20;

Commonwealth v. *Phelps*, 209 Mass. 396. The power to arrest on probable cause antedated the warrant procedure and has never been replaced by it. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 548–550, 673, 685–689. The essential requisite in either case is that only such force as is required by the circumstances may be employed. For this reason, the actual holdings in cases like *Accarino* v. *United States*, 179 F. 2d 456, 463 (C. A. D. C.), and *McKnight* v. *United States*, 183 F. 2d 977 (C. A. D. C.), are not inconsistent with our position here. The basis of decision in those cases is that an arrest may not be a mere subterfuge to make a search; in other words, there must be probable cause to arrest *in the apartment* before a forced entry can be made. But, where the person whose arrest is sought on probable cause is in his apartment (and under all the circumstances of this case), the apartment may be entered to make the arrest by the exercise of the limited amount of force used here.

B. If "after notice of his authority and purpose" an officer executing a search warrant is refused admittance, he is authorized, under 18 U. S. C. 3109, to break open a door. We agree with petitioner that, where an arrest is made on probable cause rather than a warrant, these statutory requirements must be met before an officer can force entry into an apartment. However, the facts refute petitioner's contention that the arresting officers in this case failed to comply with these requirements of notice. The police identified themselves when they knocked at petition-

er's door. When he opened the door, he "took one look" at the officer (whom he had previously encountered in connection with an earlier narcotics violation) "and tried to slam the door" (R. 27). In resisting this attempt to bar their entry, the officers broke the door chain. In light of petitioner's immediate reaction to the officers' presence, and the fact that he had just committed a felony, there can be little doubt that he knew who the officers were and why they were there. To say that in these circumstances the officers were required to announce their purpose more formally than they did is to disregard the actualities of the situation. Certainly their purpose was well understood. Cf. *Accarino* v. *United States*, 179 F. 2d 456, 463 (C. A. D. C.).

In those cases where absolute silence greets an officer's demand for entry, he is not required to state his purpose to the empty air. See, *e. g.*, *People* v. *King*, 140 Cal. App. 2d 1. There is even less justification to require a more formal announcement of purpose to one who, by his actions, shows he knows the reason for the visit and intends forcibly to prevent entry. Where split-second action is necessary, the law does not require an extended exposition of the obvious. Moreover, here the officers used only such force as needed to prevent petitioner's door from being slammed in their faces. The extent of the damage was a broken door-chain.

III

Since the arrest in this case was lawful, it follows that the search incident thereto was valid. *Harris* v.

United States, 331 U. S. 145, 150–151. The search, which followed immediately after the arrest, lasted no more than an hour and a half; some of the marked money was found on the person of Byrd who was also arrested and the remainder was located in the same room in which the arrest was made. The search met the test of reasonableness set forth in *United States* v. *Rabinowitz,* 339 U. S. 56, 64, 68.

In addition, the search did not offend the stricter requirements of *Trupiano* v. *United States,* 334 U. S. 699, 708, that there be "* * * something more in the way of necessity than merely a lawful arrest". The necessity permitting a search without a warrant as incident to a lawful arrest, found lacking in *Trupiano,* was present here. For unless the agents moved with speed, there can be little doubt that the marked money would have been destroyed or effectively concealed.

ARGUMENT

As we view it, the basic question in this case is whether the officers had probable cause to arrest petitioner in his apartment. If they did—and we believe the facts clearly established that they did—the officers were authorized to use such force as necessary to accomplish that lawful purpose. Hence, they were authorized to enter petitioner's apartment forcibly when he sought to bar their entry after they had identified themselves as police officers, and when the circumstances indicated that petitioner clearly understood, if he was not explicitly told, that their purpose was to arrest him. Accordingly, the particular and limited search incident to that lawful arrest was valid,

and the marked money seized was properly admitted in evidence.

I

HAVING PROBABLE CAUSE TO BELIEVE THAT PETITIONER HAD JUST COMMITTED A FELONY IN HIS APARTMENT, THE POLICE OFFICERS WERE FULLY AUTHORIZED TO ARREST HIM IMMEDIATELY IN THE APARTMENT WITHOUT A WARRANT

Consistent with the rule at common law (*Kurtz* v. *Moffitt*, 115 U. S. 487, 504; *Carroll* v. *United States*, 267 U. S. 132), the law of the District of Columbia is that officers having probable cause to believe that a felony is being, or has been, committed are empowered to arrest without a warrant. D. C. Code 4–140, 141; *Wrightson* v. *United States*, 222 F. 2d 556, 558 (C. A. D. C.); *Newyahr* v. *United States*, 177 F. 2d 658 (C. A. D. C.), certiorari denied, 338 U. S. 936; *Shettel* v. *United States*, 113 F. 2d 34 (C. A. D. C.); *Maghan* v. *Jerome*, 88 F. 2d 1001 (C. A. D. C.); *United States* v. *Jackson*, 149 F. Supp. 937 (D. C. D. C.).[7]

As this Court has recently observed in *Brinegar* v. *United States*, 338 U. S. 160, 175–176: "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in

[7] Precisely the same criterion now applies under federal law. Thus, 26 U. S. C. 7607, added July 18, 1956, gives a narcotic agent authority to make an arrest where he has "reasonable grounds to believe that the person to be arrested has committed" a narcotics offense.

the belief that an offense has been or is being committed. *Carroll* v. *United States*, 267 U. S. 132, 162." From the rapid series of events occurring on the morning of March 25, 1955, the officers had "reasonably trustworthy information" to believe that petitioner had committed a felony in his apartment. A summary of the events of that morning makes this clear:

At 1:30 A. M., the officers learned from Reed—who had provided reliable leads in the past—that he had been purchasing narcotics from petitioner's agent, Shepherd. Reed advised the officers that the sales were being conducted from petitioner's apartment by petitioner and Shepherd's sister, Bessie Byrd. Reed also stated that he had an appointment that very night, at about 3:00 A. M., to meet Shepherd and consummate another sale. The officers knew petitioner and his co-defendant Byrd, knew of petitioner's past narcotics conviction, and of his previous dealings in narcotics. Taking advantage of this opportunity to break up a narcotics ring of which they had learned on the very night that a sale was to take place, the officers sent Reed off on his rendezvous accompanied by agent Lewis. The agent was given $100 in marked currency to be delivered to Shepherd for 100 capsules of narcotics. The officers observed the meeting with Shepherd, and saw Lewis' signal that the money had passed. They then followed Shepherd to petitioner's home. They observed Shepherd enter, saw a light go on and then go off shortly before he departed. They followed Shepherd for a few blocks and then stopped his cab. In it, they found a package he had dropped

under his seat containing 100 capsules which were immediately field-tested on the scene and were found to contain opium. The $100 in marked funds that he had previously been given was missing. Shepherd at first denied that the capsules were his, but then changed his story and claimed that he had found them behind a fire extinguisher in the basement entrance leading into petitioner's apartment (see the Statement, *supra*, pp. 3–5).

It was at this point, after a series of events which lasted no more than three hours in the early morning, that the validity of Reed's information was established, and that the officers proceeded to petitioner's apartment to arrest him. We think that they were amply justified in concluding from these events that a felonious sale of narcotics had taken place in petitioner's apartment a few minutes before, and that petitioner was a participant. Further, they had reason to believe that a continuing felony was taking place in that petitioner was illegally in possession of additional narcotics in violation of the law.[8] Against this background, the officers had more than ample grounds to make an arrest immediately, and, as we shall show, delay would have seriously jeopardized, if it would not have precluded opportunity to arrest and establish the guilt of the principal figure in this narcotics operation.

[8] As it later turned out, 381 additional capsules of heroin were found in the basement furnace room adjoining petitioner's apartment. However, these capsules were suppressed on the ground that there was no showing that the furnace room was in petitioner's control (R. 198–199).

Where probable cause exists, a warrant to arrest is not required under District of Columbia law (*supra*, p. 13) even if opportunity to obtain one exists. Cf. *Trupiano* v. *United States*, 334 U. S. 699. And at four o'clock in the morning, there was no real opportunity to obtain a warrant. Moreover, the hour at which the narcotics sale was to take place was one deliberately chosen by members of this ring (*supra*, p. 3); and they should not be permitted to derive an advantage because they carried on their illicit traffic at times when immediate resort to judicial authority is not feasible. In any event, the police were, on the facts of this case, justified in not waiting to make an arrest until business hours, or at least until the necessary papers could be prepared and an official authorized to issue warrants could be located and persuaded to act at that unusual hour. There was a real likelihood that petitioner would learn of the arrest of his runner, Shepherd, before long and would take this fact as warning. This likelihood was even greater than would be presented by the usual "grapevine" methods and the principal-agent relationship between petitioner and Shepherd, for Shepherd was the younger brother of Bessie Byrd, with whom petitioner lived, and Shepherd could usually be located at petitioner's mother's home (R. 12). Long before a warrant could be obtained, petitioner could have hidden himself, the narcotics, and the money. There was thus good reason for the police to seek to arrest petitioner immediately; and the place where the arrest had to be made was where petitioner could

then be found—and where he had committed the felony—in his apartment.

Thus, this case is materially different from *Johnson* v. *United States,* 333 U. S. 10, and *McDonald* v. *United States,* 335 U. S. 451, in both of which this Court found that officers had no probable cause to arrest before they made the wrongful entry. In *Johnson,* the Court pointed out that there was no probable cause to arrest any particular person until after the officers had entered the room. Here, the officers had probable cause, based on the statements of Reed and Shepherd, and the events that the officers had themselves witnessed, to believe that *petitioner,* then in his apartment, had committed a felony. In *McDonald,* in marked contrast to the facts here, the officers, after two months of surveillance, still did not have the evidence of gambling which they were seeking until they had illegally entered the rooming house in which that petitioner lived and gained access to the hallway from which the lottery operations could be observed.

In this case, on the other hand, when the officers sought to gain access to petitioner's apartment, they had obtained, in the few hours immediately preceding the arrest, information leading to probable cause to believe that an offense had just been committed by petitioner in that apartment. They also had good reason to believe that petitioner was at that moment still in the apartment. The sum of these factors is that the officers had sufficient reason to arrest petitioner *in the apartment.* They were faced with the

choice of waiting several hours to get a warrant or of seeking immediate entry. As we have shown, they had reason to believe that, if petitioner had not yet learned of Shepherd's arrest, he would have word of it in a short time (see *supra,* p. 16) and would take steps to prevent his own apprehension and arrest.

The record, of course, does not disclose the precise reasoning of each of the officers who acted together in response to the situation with which they were suddenly confronted. The crucial issue is whether the facts themselves, as known to the officers, justified the action which they took, and speculation as to the underlying motivation of the officers is pointless. Thus, the result is the same even if we assume that the decision to make an immediate arrest was influenced, in part, by the fear that by business hours petitioner could have disposed of the marked money and additional narcotics. The fact that police officers might have wished, on valid grounds, to seize fruits of the crime as well as to make an arrest does not convert the arrest into a search. The fact remains that there was good reason to arrest petitioner immediately in the place where the offense had just been committed, namely, his own apartment. In actual fact, the arrest preceded the search and was validly based on probable cause—entirely without regard to the results of that search.

II

SINCE THE OFFICERS HAD AUTHORITY TO MAKE AN IMMEDIATE ARREST OF PETITIONER IN HIS APARTMENT, THEY HAD AUTHORITY TO USE THE LIMITED FORCE HERE EMPLOYED TO MAKE AN ENTRY FOR THIS PURPOSE WHERE NECESSARY TO OVERCOME PETITIONER'S PHYSICAL RESISTANCE.

A. WHERE THERE IS PROBABLE CAUSE FOR ARREST WITHOUT A WARRANT IN A HOME, THE OFFICERS ARE JUSTIFIED IN USING THE FORCE NECESSARY TO EFFECTUATE THE ENTRY.

Petitioner concedes (Pet. 24), and the law is clear, that an officer having lawful authority to arrest may, if necessary, break into a person's apartment to effect the arrest. He may, where necessary, break in either pursuant to a valid warrant[9] or where he has probable cause to believe that a felony has been committed. See, *e. g.*, *Agnello* v. *United States*, 269 U. S. 20; *Martin* v. *United States*, 183 F. 2d 436 (C. A. 4), certiorari denied, 340 U. S. 904; *Mattus* v. *United States*, 11 F. 2d 503 (C. A. 9); *Appell* v. *United States*, 29 F. 2d 279 (C. A. 5); *Mullaney* v. *United States*, 82 F. 2d 638, 641 (C. A. 9); *United States* v. *Dean*, 50 F. 2d 905, 906 (D. Mass.); *United States* v. *Chin On*, 297 Fed. 2d 531, 533 (D. Mass.); *Commonwealth* v. *Phelps*, 209 Mass. 396; *Argetakis* v. *State*, 24

---

[9] See, *e. g.*, *United States* v. *Faw*, Fed. Cas. No. 15,079; *Kelsy* v. *Wright*, 1 Root 83 (Conn., 1783); *State* v. *Shaw*, 1 Root 134 (Conn., 1789); *Hawkins* v. *Commonwealth*, 53 Ky. 395; *Barnard* v. *Bartlett*, 64 Mass. (10 Cush.) 501; *Commonwealth* v. *Irwin*, 83 Mass. (Allen) 587; *Commonwealth* v. *Reynolds*, 120 Mass. 190; *State* v. *Mooring*, 115 N. C. 709; *State* v. *Shook*, 224 N. C. 728, 733–734; *State* v. *Smith*, 1 N. H. 346; and cases collected in 5 A. L. R. 263.

Ariz. 599, 606; *Shanley* v. *Wells*, 71 Ill. 78, 82; *McLennon* v. *Richardson*, 81 Mass. 74, 76; *Smith* v. *Tate*, 143 Tenn. 268, 275–276; 1 Wharton's Criminal Procedure (10th ed.) § 51; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 798, 800–807. Historically, the power to arrest on probable cause without a warrant preceded the development of the warrant procedure and has never been supplanted by it. In this case, therefore, the officers who had personal knowledge of circumstances which gave rise to probable cause and proceeded on that basis had the same authority to execute an arrest as would an officer who had procured a warrant. See Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 548–550, 673, 685–689, 798, 800–803.

In *Agnello* v. *United States*, 269 U. S. 20, the arrest was made without a warrant at the home of Alba, into which the agents "rushed in" (269 U. S. at 29), after viewing from outside what appeared to be a narcotics transaction; there was no challenge to the validity of the arrest. And in *Martin* v. *United States*, 183 F. 2d 436 (C. A. 4), certiorari denied, 340 U. S. 904, the officer having probable cause to believe that the accused was violating the liquor laws entered the garage, arrested him, and seized the liquor. The Court held: "Nor can it be doubted that the officer having probable cause for the arrest had authority to enter the premises and take the probationer into custody" (183 F. 2d at 439). Similarly, see *Mattus* v. *United States*, 11 F. 2d 503 (C. A. 9), where the search incident to the arrest was upheld, despite the fact that the arrest-

ing officers forced an entry on the ground that they had reasonable cause to believe that a narcotics sale had occurred in the house.

We think the dissenting judge below was in error in assuming that, at least in such circumstances as those of this case, the right of officers to make a forcible entry in order to arrest is less when the arrest is without a warrant than when it is made pursuant to a warrant. In neither case, of course, is it permissible to use more force than is necessary under the circumstances. For that reason, we have no quarrel with the actual holdings in such cases as *Accarino* v. *United States*, 179 F. 2d 456, 463 (C. A. D. C.), where the officers had had the defendant under surveillance for a number of days, and had had reasonable opportunity to arrest him long before he entered his home, but nevertheless broke down his door without announcing their purpose, having no reason to believe that a felony had been committed in the premises. The arrest was properly held to be merely a subterfuge to make a search. Again in *McKnight* v. *United States*, 183 F. 2d 977 (C. A. D. C.), the officers could have arrested the accused on the street. However, they were given specific orders not to arrest him until he entered a certain house. They had no probable cause to arrest him in the house, and the arrest was merely an excuse to search. Similarly, see *Gibson* v. *United States*, 149 F. 2d 381, 383 (C. A. D. C.), certiorari denied *sub nom O'Kelley* v. *United States*, 326 U. C. 724 (where the arrest, not on probable cause, was merely a pretext to make a search); and see also *Gatewood* v. *United States*, 209 F. 2d 789, 790 (C. A. D. C.) (where

there was no probable cause to seek to make the arrest in the apartment and where the officers gained entry by posing as "Western Union"); *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 693 (C. A. D. C.) (no probable cause to arrest). The thrust of these cases is, not that an entry may never be made into an apartment to arrest on probable cause, but rather that the authority to arrest cannot be used as a ruse to get into a place where the authorities would otherwise have no occasion to be. In other words, there must be probable cause to arrest *in the apartment* to justify forcible entry without a warrant, particularly where there has been opportunity to arrest outside the apartment. But it does not follow from these cases that, where an immediate arrest is justified—as we have shown it was here—and where the person sought is in his home at the time—that the home may not be entered. The numerous cases cited above (*supra*, pp. 19–20) show that, where there is a good reason to believe that a crime is being or has just been committed by a person in his home, the officers may properly enter the home, by such force as is necessary, in order to make the arrest.

B. THE OFFICERS MADE KNOWN THEIR AUTHORITY AND PURPOSE BEFORE FORCING ENTRY INTO PETITIONER'S APARTMENT

Petitioner seemingly concedes that authority existed to make a forced entry on probable cause to arrest, but argues that here that authority was improperly exercised (Pet. Br. 22–30). He contends that the conditions under which a forced entry to arrest on probable cause may be effected are to be determined under 18 U. S. C. 3109 (providing that an officer

executing a search warrant may break open a door only if, "after notice of his authority and purpose," he is refused admittance, and that there was no such compliance since the officers did not specifically articulate their purpose. We agree that the validity of the entry should be tested under the standard of 18 U. S. C. 3109. We disagree however with petitioner that the arresting officers did not comply with the terms of the statute.[10] We submit that such compliance is evident from the events immediately preceding the officers' forced entry.

Following Shepherd's arrest and search—which turned up the 100 capsules of narcotics in place of the $100 in marked funds—the police officers went immediately to petitioner's apartment. All the officers except Wurms reached the apartment by way of the unlocked basement door. Wurms entered by way of the first floor, using a skeleton key to open a door leading to a stairway down to the basement. When all the officers met in front of petitioner's apartment, Wurms knocked twice and identified the

---

[10] The substance of 18 U. S. C. 3109 was originally in the Espionage Act of 1917, 40 Stat. 229. It "was based upon the New York law on this subject [now Code Cr. Proc. § 799], and follows generally the policy of that law." Conf. Rep. No. 69, 65th Cong., 1st Sess., p. 20; 55 Cong. Rec. 3305, 3307. In New York, under a different section of the code, precisely the same authority to break in—if after "notice of his office and purpose," he is refused entry—is given to a police officer where he arrests solely on probable cause. N. Y. Code Cr. Proc. § 178. By a parity of reasoning, it should follow that, by defining the incidents of the authority to break in under a search warrant, Congress did not intend to exclude a like entry made on probable cause for arrest.

officers as police. Thereupon, the accused opened the door slightly and—according to officer Wurms—"He took one look at me and tried to slam the door * * *" (R. 27). The officers resisted this effort, succeeded in pulling the door open, and in the process broke the door-chain. They immediately entered and arrested petitioner and co-defendant Byrd. They found $34 of the marked funds in Byrd's possession and the remaining $66 in a hat box and in a bed in the room in which petitioner and Byrd were arrested (see the Statement, *supra*, pp. 6-7).

During this split-second transaction in which the officers sought and were denied entry, they sufficiently identified themselves and made known their purpose to petitioner. In the first place, they specifically identified themselves as police officers when they knocked. Secondly, the circumstances under which they sought entry in the early hours of the morning and petitioner's instantaneous resistance to their entry certainly points up that he knew their purpose immediately. He had previously encountered one of the officers in connection with an earlier narcotics violation. The very presence at the door of the officers was sufficient to advise petitioner more graphically than anything else that his narcotic business was at an end. His almost instinctive attempt to bar their entry after they had identified themselves as police emphasizes that he had, at once, realized that he had been detected and that the officers were there to arrest him. It would be wholly unrealistic to say that the officers had not made their purpose known because

they did not more formally announce that they were there to arrest him.[11] In this case, at least, it seems fair to say that petitioner's action amply indicated that the officers had communicated their purpose to him. As observed by the court below, "* * * the exact course to be taken by the officers in a split second of resistance was not the subject of a blueprint" (R. 250).[12]

Faced with petitioner's energetic attempt to bar their entrance, there seems little reason to say that the

---

[11] As noted *supra*, p. 6, fn. 5, agent Wilson testified at the trial that petitioner was told, in answer to an inquiry, "Police, you are under arrest, we want in." And of course, in passing upon the denial of a motion to suppress, the reviewing court may properly consider the whole record, not merely the evidence adduced prior to the ruling. *Carroll* v. *United States*, 267 U. S. 132, 162, *Rent* v. *United States*, 209 F. 2d 893, 896 (C. A. 5).

[12] The argument that officer Wurms' initial entry into the basement by means of a skeleton key was also unlawful is without merit. He did not climb through a window into an occupied room as in *McDonald* v. *United States*, 335 U. S. 451, but rather used an empty stairway and furnace room, invading no one's privacy. See p. 6, *supra*, fn. 3. Officer Wurms could have entered through the basement with the rest of the officers. Instead, without interfering with any of the tenants of the building, he took a different route, probably to cut off any path of escape which petitioner might otherwise have available before the officers reached his apartment. This certainly was not an unlawful entry.

Moreover, as we have noted, *supra*, p. 17, the *McDonald* case is also distinguishable on the grounds that the officers in that case had had the defendant under surveillance for two months, during which time a warrant could have been obtained if probable cause existed. Here, the officers were responding to a situation demanding immediate action which had just become known to them and which provided probable cause to believe that the felony had just been committed in the apartment.

officers were required to articulate more specifically their purpose when petitioner obviously knew why they were there. The officers had only the mere opportunity to identify themselves in the manner indicated by their testimony before petitioner demonstrated by his violent attempt to bar their way that he knew their objective. Any hesitation on their part might have given petitioner some precious moments to attempt an escape. Under these circumstances, their entry complied with the teaching accepted in *Accarino* v. *United States*, 179 F. 2d 456, 463, that:

> Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, *unless this is already understood, or the peril would be increased.* [Emphasis added.]

In short, the officers were required to proceed as the circumstances dictated. Here, the circumstances did not permit of unhurried procedure. From petitioner's immediate reaction to their presence, the officers could take it that he well understood the purpose of their call. Where split-second action is necessary, the law does not require an extended exposition of the obvious. All the officers did was to take action to prevent petitioner from slamming the door in their faces. All the damage they did was to a chain on the door. They were justified in using this limited degree of force to meet petitioner's obvious aim to bar them from entering to arrest him.

State decisions hold that, where absolute silence greets an officer's demand for entry, he is not required to announce his purpose to the air. See, *e. g., Thigpen* v. *State,* 51 Okla. Cr. 28; *Collins* v. *State,* 184 Tenn. 356; *People* v. *King,* 140 Cal. App. 2d 1, 8–9; *People* v. *Maddox,* 46 Cal. 2d 301, 306, certiorari denied, 352 U. S. 858; cf. *Hiller* v. *State,* 190 Wisc. 369, 375–376. And compare *Woods* v. *United States,* 240 F. 2d 37 (C. A. D. C.), holding that where the officers did not demand entry but merely knocked they had no authority to break in where there was no answer, with *United States* v. *Freeman,* 144 F. Supp. 669, 670 (D. C. D. C.), where the court held that 18 U. S. C. 3109 had been complied with because the officer, unlike the situation in *Woods,* gave notice of his authority before he broke in. Still less should officers be required to announce their purpose to one who shows by his actions that he knows that purpose and intends to do what he can to prevent its accomplishment.

III

SINCE THE ARREST WAS VALID, THE SEARCH INCIDENT TO ARREST WAS LAWFUL

As this Court noted in *Harris* v. *United States,* 331 U. S. 145, 150–151, "[s]earch and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states." See also *United States* v. *Rabinowitz,* 339 U. S. 56, 60; *Agnello* v. *United States,* 269 U. S. 20, 30; *Carroll* v. *United States,* 267 U. S. 132, 159; *Weeks* v. *United States,* 232 U. S. 383, 392.

Upon entering the apartment, the officers put petitioner and Byrd under immediate arrest. The search then followed. On Byrd's person the officers found $34 of the marked funds. The remaining $66 was found in a hat box and in a bed located in the same room where the arrest was made. The entire search, including that of the furnace room, took no more than an hour and a half (R. 101–107). Clearly, "the total atmosphere of the case" is such to show the search to be reasonable under the rule of *United States* v. *Rabinowitz,* 339 U. S. 56, 64, 66.

More than that, however, the search here did not offend the more stringent test announced in *Trupiano* v. *United States,* 334 U. S. 699, since there was "* * * something more in the way of necessity than merely a lawful arrest" (*Id.* at 708) to warrant immediate search of the premises where there was good reason to believe that an offense had just been committed. The same reason that justified an immediate arrest of petitioner—the prior arrest of Shepherd—gave the officers good reason to fear that, if they should wait until the next morning to procure a search warrant, the marked funds would have long since been destroyed or effectively concealed.

The circumstances in which the search was made in this case are therefore in marked contrast to those in *Trupiano.* There, the law enforcement officers had observed the operation of a still for some months before the arrest; they knew the precise nature and location of the contraband, and that it was of a type that could not have been dismantled and removed before

a warrant could be secured. Despite this, no search warrant was obtained before the officers arrested and searched. On these facts, the Court held that there was "* * * no reason * * * why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated" (334 U. S. at 708). Here, on the other hand, there was no prior opportunity to obtain a warrant during the few short hours in the early morning when the crime was detected. Unlike *Trupiano*, there was, under the circumstances of this case, "* * * some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant" (*id.*). That factor was that, unless the officers acted immediately, the petitioner undoubtedly would have disposed of the marked money.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.
RUFUS D. MCLEAN,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957